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IN THE

Supreme Court of the United States

_____ Term, 1975

No. 75-89

J. H. CHEATHAM, ET AL — PETITIONERS

VS.

ILLINOIS CENTRAL GULF RAILROAD CO., ET AL — RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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VS.

ILLINOIS CENTRAL GULF RAILROAD CO., ET AL — RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, J.H. Cheatham, et al, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on February 5, 1975.

OPINIONS BELOW - JURISDICTION

The U.S. District Court for the Western District of Kentucky, Paducah Division, Hon. James F. Gordon, entered summary judgment for the two defendants-respondents on February 14, 1974. The

Sixth Circuit Court of Appeals decided and filed an opinion on February 5, 1975, affirming the District Court's grant of summary judgment. The Sixth Circuit Court of Appeals filed a denial of petitioners' request for a rehearing on April 17, 1975. None of these opinions have been reported, and each of them is attached hereto. There has been no request for any extension of time within which to petition for certiorari. 28 U.S.C.A. §1254(1) confers upon the Supreme Court jurisdiction to review these decisions by Writ of Certiorari.

QUESTIONS PRESENTED

I. DOES A UNION'S DUTY TO FAIRLY REPRESENT ITS MEMBERS NOT EXTEND BEYOND CLEAR, VESTED CONTRACT RIGHTS?

II. MUST AN EMPLOYEE-UNION MEMBER CARRY HIS OWN GRIEVANCE WITHOUT UNION ASSISTANCE, TO BINDING ARBITRATION CONTROLLED BY HIS EMPLOYER AND HIS UNION, AFTER THE EMPLOYEE HAS MADE A CLAIM AGAINST BOTH HIS EMPLOYER AND HIS UNION?

III. IS THERE A PRE-TRIAL REQUIREMENT OF EXTRAORDINARY PROOF BORNE BY A PLAINTIFF IN A BREACH OF DUTY OF FAIR REPRESENTATION CLAIM?

IV. WAS THERE AN ISSUE OF MATERIAL FACT?

STATUTES INVOLVED

The precise language of no particular statute needs to be interpreted for purposes of this appeal. The questions involved deal with the judicially developed doctrine of the duty of fair representation which was implied from the language of the Railway Labor Act, 45 U.S.C.A. §151, et. seq. Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192-209, 89 L.Ed. 173, 65 S.Ct. 226 (1944).

STATEMENT OF THE CASE

The plaintiffs-petitioners are all former employees of defendant-respondent Illinois Central Gulf Railroad, and former members of Lodge No. 152 of defendant-respondent, the Brotherhood of Railway Carmen of the United States and Canada, operating through System Number 99, Railway Employees Department, AFL-CIO. The petitioners were all working at Fulton, Kentucky in the spring of 1969 when Illinois Central posted a notice that all of the petitioners' jobs at the Fulton, Kentucky location were being abolished. Pursuant to one of the applicable labor-management agreements in force at the time, hereinafter referred to as the 1964 Agreement, (Ex. "A", Exhibits to Appendix) representatives of the respondent Union and the respondent Railroad met and worked out an Implementing Agreement (Ex. "B", Exhibits to Appendix). Under the terms of the Implementing Agreement, all employees whose jobs were abolished were

required to transfer to other points on the line where jobs were open. The bulk of these jobs would have been either on the outskirts of Chicago, Illinois, or in Memphis, Tennessee (Implementing Agreement, Ex. "B", p. 16). To accept any of these jobs would have involved a loss of 15 to 20 years' seniority for most of the petitioners; they would have had to start all over again in new seniority districts (Par. 4, Implementing Agreement, Ex. "B", Exhibits to Appendix). One of the applicable contracts governing the petitioners' employment was the ICRC Schedule of Rules. Rule No. 21 dealing with "employees' transfer" provides in pertinent part:

> "Employees will not be compelled to accept a permanent transfer to another point or seniority district". (Appendix, p. 72a)

Neither respondent has denied, either by affidavit or in any other manner, that the respondent Railroad had consistently in the past offered employees in the petitioners' situation an option to either (a) accept a transfer with certain benefits making the employee whole for moving expense and offsetting any loss of wage, or (b) in lieu thereof, the employees had been allowed to accept a severance allowance if they chose to leave Railroad employment (Dist. Ct. Opinion, Appendix, p. 90a). Petitioners had repeatedly seen fellow workers offered this option in the past (Cheatham, Clark Affs., Appendix, pps. 51a, 55a). None of the petitioners were willing to leave their small-town homes of 15 to 20

years to move to the urban areas where most of the proffered jobs were located, and, instead, wanted to accept the severance allowance which had theretofore been offered (Durbin Aff., Appendix 58a). The respondent Railroad in this instance refused to offer any severance allowance, taking the position that the 1964 Agreement did not so require, and that the men could be required to transfer to another seniority district on penalty of losing all of their protective benefits. The petitioners instituted a grievance proceeding and sent letters to respondent Union officials asking assistance. The respondent Union did at least go through the motions of processing the grievance up to the stage of arbitration (Zack Aff., Appendix, p. 19a). There was evidence that the Union's efforts were perfunctory. The general chairman arranged for a meeting with the appropriate Railroad official to discuss the grievance. After having arranged the meeting, the Union official said nothing in the employees' behalf (Cheatham Aff., Appendix, p. 51a). Instead of pointing out the Railroad's prior course of conduct in consistently paying these benefits before, the respondent Union made such arguments as the respondent Railroad should pay the petitioners roughly $10,000.00 each because the petitioners had read a newspaper article in which a railroad official was quoted as saying that such would be the case. The respondent Union refused to take the employees' grievance to arbitration. Although such is not found in the contract, the employees would apparently

have been allowed to have processed their own grievance before the Special Board of Adjustment set up by the 1964 Agreement (Zack letter, Appendix, p. 42a).

However, the petitioners do not rely on the respondent Union's perfunctory handling of the grievance or the Union's refusal to take it to arbitration as the basis of the respondent Union's breach of its duty of fair representation. The respondent Union was responsible for prodding the respondent Railroad into refusing to pay severance allowance in the first place. The respondent Union initiated the grievance, they did not just fail to properly handle it. In trying to get effective assistance from their exclusive bargaining agent, the petitioner Union members made a phone call to the headquarters of the Railway Employees' Department, AFL-CIO (hereinafter referred to as RED). There they talked with a Mr. James Yost, who was President of the Railway Employees' Department, AFL-CIO. Mr. Yost, the ultimate in the Railway Union hierarchy, became angry during the course of the telephone conversation and admitted the following:

> "Mr. Yost said that the railroad had a peach basket full of money and had been going up and down the line buying up jobs. Yost said that the workers did not need severance pay, that they did not know how to handle that much money,

> that they would spend it all in 6 weeks getting drunk, their kids would go naked, and they would all be on welfare. Yost said that he was interested in jobs not severance pay. He said, if you want to know who stopped the severance pay, we stopped it. We finally got the railroad to quit paying severance allowance." (App., p. 50a-51a) (Emphasis added)

This statement was supported by three affidavits submitted by petitioners (Appendix, pps. 50a, 53a, 56a). The respondent Union filed the affidavit of Mr. Yost in which he admits remembering the phone call; he even admitted that the subject matter was the same as set out in the plaintiffs' affidavits (Yost Aff., par. 9). There were, of course, differences in his memory in regard to exactly what was said and the manner in which it was spoken. At least for purposes of summary judgment, with nothing but conflicting affidavits before the District Court, it must be taken as true that the Union did, in fact, initiate the cut-off of benefits to its own members. Mr. Yost was certainly in a position to know, and he said that. This is the basis of the plaintiffs' claim that the Union breached its duty of fair representation. At the very least this is strong evidence that the Union's action in going through the motions of processing the grievance was deceitful.

One of the employees whose job was abolished at Fulton, Kentucky, did

process his claim for severance pay through arbitration before the contract arbitration tribunal, Special Board of Adjustment. He lost (Martin Aff., Appendix, p. 169). The members of the Special Board appointed exclusively by the Union did vote in favor of the employee's grievance. One of those union member's affidavit, Richard E. Martin, was presented by the respondent Union. Richard E. Martin's affidavit points out that his regular union position was as an assistant to Mr. James E. Yost (Appendix, p. 16a). Mr. Yost, it must be remembered, was the very union official who claimed personal responsibility for "finally getting the Railroad to quit paying severance allowance". The Amended Complaint alleged, inter alia, the following:

> "6. As the exclusive bargaining agent representing the plaintiff employees the defendant Union was under a well recognized duty to fairly represent its members. This is a fiduciary obligation imposed both by the Railway Labor Act and the National Labor Relations Act." (Par. 3)
>
> "9. Acting out of self-interest, the defendant Union breached its fiduciary duty to fairly represent the plaintiffs by placing its own self-interest above that of its members. Motivated by this self-interest, the defendant Union arbitrarily, maliciously and

> in bad faith conspired with the defendant Railroad to deprive the plaintiffs of their right to severance pay under the September 25, 1964 Agreement. The Union through its high officials urged and conspired with the Railroad to deprive plaintiffs of their rights to severance pay." (Par. 4) (Emphasis added)
>
> "11. Plaintiffs made repeated demands on defendant Union to actively prosecute their claim for severance pay. The defendant Union made only token efforts in plaintiffs' behalf and arbitrarily and in bad faith refused to prosecute a grievance claim to arbitration." (Par. 5)

The Federal District Courts have jurisdiction to hear suits brought by Union members against their own union for breach of that union's duty of fair representation. Czosek v. O'Mara, 397 U.S. 25, 25 L.Ed.2d 21, 90 S.Ct. 770 (1970).

ARGUMENT

A. DOES A UNION'S DUTY TO FAIRLY REPRESENT ITS MEMBERS NOT EXTEND BEYOND CLEAR, VESTED CONTRACT RIGHTS?

The duty of fair representation was developed by the Supreme Court in the context of racial discrimination.

Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 89 L.Ed. 173, 65 S.Ct. 226 (1944). This duty has subsequently been expanded to forbid discriminatory arbitrary conduct based on matters other than race by the Union against its own members. Czosek v. O'Mara, supra. However, in this Court's most recent pronouncement regarding the duty of fair representation, Motor Coach Employees v. Lochridge, 403 U.S. 274, 301, 29 L.Ed.2d 473, 491, 91 S.Ct. 1909 (1971), it was stated that to prove a breach of a union's duty of fair representation, the plaintiff must "adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives . . ." Lochridge, supra, was a five-four opinion. The affected employee in that case had not raised the question of fair representation until he reached the level of the United States Supreme Court, and the Supreme Court noted that the case had been "submitted and tried on the interpretation of the contract, not on a theory of discrimination." (Supra at 490). The language used in Lochridge, supra, that the discrimination must be intentional, hostile, invidious and severe, indicates a much more demanding standard than that set out in the leading case of Vaca v. Sipes, 386 U.S. 171, 177, 17 L.Ed.2d 842, 850, 87 S.Ct. 903 (1967), wherein this Court held that the Union's duty was:

> ". . . to serve the interests of all members without hostility or discrimination toward any, to

> exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." (p. 850)

That there is confusion in the lower federal courts as to the applicable standard can readily be seen by comparing the following cases. In Schum v. South Buffalo Railway Co., 496 F.2d 328, 331 (2 Cir., 1974), the Second Circuit found a failure to fairly represent the plaintiff in the union's simply failing to proceed to the second grievance step within the applicable time limit. In Griffin v. International U., United Automobile, & A. & A.I.W., 469 F.2d 181 (4 Cir., 1972) the Fourth Circuit held the defendant union had violated its duty of fair representation in submitting the employee's wrongful discharge grievance to a management official whom the discharged employee had beaten up. That beating was the occasion for the employee's discharge. In Schum, supra, or Griffin, supra, it is easy to see arbitrary conduct by the Union, which under Vaca v. Sipes is sufficient. However, there is nothing in either of those cases which would meet the language used in Lochridge, supra. Other circuits have taken the more strict view. Compare Dente v. International Org. of Masters, Mates & P., Loc. 90, 492 F.2d 10 (9 Cir., 1974), in which the 9th Circuit, citing Motor Coach Employees v. Lochridge, held that the duty of fair representation can never be breached by "any concept of mere negligence". Further illustrating the disparity in the standards applied for outlining a

union's duty of fair representation is a comparison of the present case with that in Deboles v. Transworld Airlines, Inc., 350 F.Supp. 1274 (E.D. Pa., 1972). In Deboles, the Union was held to have violated its duty of fair representation by its deceitful action in assuring one group of employees that the union was working to achieve system-wide seniority for them, but the employer would not oblige. This was held to be deceitful because the employer had, in fact, been willing to grant that group of employees system-wide seniority, and it was the union which had not wished that group of its members to have such a benefit. There is a striking similarity in the present case where there is evidence it was the Union, not the Railroad, that initiated the denial of severance payments. Such action by the Union is not only arbitrary, but it is also plainly deceitful. The Union went through the motions of processing a grievance, ostensibly claiming severance payments for their members, when, in fact, it was not the employer, but the Union that started the problem. In Cheatham, there is evidence to support a finding of arbitrary conduct by the Union and dishonesty; yet the District Court entered summary judgment for the defendants and the 6th Circuit upheld this. As noted by the 4th Circuit in Griffin v. International U. United Automobile, A. & A.I.W., supra, the Supreme Court's definition of the Union's obligation, viz a viz its own members, has provided only "hazy contours." This is evident from the conflicting decisions illustrated above.

The 6th Circuit's opinion in the present case dramatically limits the Union's obligation of fair representation. The 6th Circuit has necessarily held that where a union member's contract rights are not clearly and indisputably set out in the written contract, such rights are not entitled to any protection at all from arbitrary interference by the employee's own union. The Supreme Court has long recognized that the labor management contract, no matter how detailed, cannot cover all contingencies and is not the exclusive source of rights between employees and employers. United Steelworkers v. Warrior & G. Nav. Co., 363 U.S. 564, 574, 579, 580, 4 L.Ed.2d 1403, 1409, 1415, 1416, 80 S.Ct. 1343, 1347 (1960). Whether the employee's rights are found in the "common law of the shop," are clear language of a written contract, or something in between these two, the rights of these individuals should not be subjected to arbitrary and discriminatory interference by the employee's own union. The opinion of the 6th Circuit and that of the District Court in the instant case would limit this protection to only those rights which are clearly set out in a written contract. It is a matter of national importance that the Supreme Court guarantee each of the millions of union members in this country that he cannot be discriminated against or treated arbitrarily by his union in any of the union's dealings with that member. This is not to say that the union cannot make value judgments which adversely affect some employees to the greater

benefit of others. But where, as here, there is no reason at all, other than the personal prejudice of high union officials against those union members who desire to leave the union and railroading, the union must be shown that it has a fiduciary obligation to its members which extends beyond the four corners of the labor management contract.

Both the District Court and the Sixth Circuit held that the petitioner's only remedy was through either the contract arbitration tribunal or the Railroad Adjustment Board. These decisions cannot be squared with Czosek v. O'Mara, supra, where the Supreme Court stated:

> "And surely it is beyond cavil that a suit against the union for breach of its duty of fair representation is not within the jurisdiction of the National Railroad Adjustment Board or subject to the ordinary rule that administrative remedies should be exhausted before resort to the courts." (Id at 24, 90 S.Ct 770 (1970))

The terms of the 1964 agreement provide that a "dismissed" employee is entitled to a severance allowance. There is no disagreement as to that point. What constitutes a "dismissed" employee is bitterly disputed. The 1964 Agreement, §3, provides:

> "An employee shall not be regarded as deprived of employment (dismissed) or placed in a worse position with

> respect to his compensation and rules governing working conditions in case of . . . failure to obtain a position available to him in the exercise of his seniority rights in accordance with existing rules or agreements. . ." (Emphasis added)

The District Court found, and appellants would agree, that this language, standing alone, indicates that an employee may be required to transfer if he is to keep his contract benefits; the Court stating:

> ". . . the terms of the basic 1964 agreement seem to us to be clear; . . ." (Appendix, p. 88A)

The problem with the District Court's analysis is that he did not take into consideration related agreements. In construing the meaning of a collective bargaining agreement, the Court must consider all the related agreements existing between the parties and the meaning which had been given those terms by past practice. United Steelworkers v. Warrior & G. Nav. Co., 363 U.S. 564, 4 L.Ed.2d 1403, 1409, 1416, 80 S.Ct. 1343, 1347 (1960). The quoted material from the 1964 Agreement clearly adopts by reference other existing rules or agreements. One of those rules or agreements was ICRC Rule 21, which states inter alia:

> "Employees will not be compelled to accept a permanent transfer to another point or seniority district."

An existing agreement between the same parties which was incorporated by reference in the 1964 Agreement, says that an employee cannot be required to change his seniority district. As pointed out in Article I, §2 of the 1964 Agreement, one of the purposes of that agreement was to provide benefits for an employee who was placed in a worse position with respect to rules governing working conditions. The loss of from 15 to 20 years of seniority certainly places an employee in a worse position with respect to the rules governing his working conditions. The benefits available for a "displaced," as opposed to "dismissed" employee, protect income but do not make any provision to protect the employee from this severe change in his status with respect to working conditions. Thus, the 1964 Agreement, when read as a whole, states in one place that an employee can be required to do something, and in a different section that an employee will not be required to do that same act. Without an option to take severance pay in the event that changing jobs involves changing seniority districts, nothing in the agreement either protects or provides an alternative for massive instant loss of seniority. Such an adverse change in working conditions is one of the things the 1974 Agreement expressly was to protect. As noted by the District Court (Appendix, p. 90a), neither defendant denied or in any way attempted to refute the assertion that the Railroad had in the past paid severance allowance to other workers in the same situation as the plaintiffs-appellants. The District

Court found the 1964 Agreement to be "clear"; however it is clear only if the District Court ignores a related and expressly incorporated, co-existing agreement, and further ignores the history of the parties' past interpretation of the same language. Under Warrior & Gulf, supra, it was error for the District Court to look only at the language of the 1964 Agreement.

It must be remembered that the District Court did not base its decision on a question of contract interpretation, but rather, upon the plaintiffs' failure to exhaust contractual arbitration remedies:

> "As plaintiffs concede, it is from the 1964 agreement that their rights, if any, flow, and it is their failure to invoke and exhaust the grievance machinery of that agreement, or the provisions of the Railway Labor Act dealing with the handling of such grievances, that is the basis of this Court's action." (Appendix, p. 91a) (Emphasis added)

The Sixth Circuit did not discuss the contractual issue in either opinion; it, like the District Court, based its decision on what it considered a lack of evidence of Union wrong-doing. The lower courts reasoned that without evidence the Union breached its duty of fair representation, then the arbitration tribunals have exclusive jurisdiction.

The plaintiffs-petitioners' claim against defendant railroad is bottomed on a breach of contract and complicity

with the defendant Union in its breach of duty. However, the claim against the defendant Union is not related to the issue of contract interpretation. If the present case involved only the question of whether the Union had acted arbitrarily in failing to process or processing perfunctorily a grievance, the existence of a contract interpretation issue would be relevant. Unless the Union members' grievance is clearly meritorious, then no court can with reason hold the Union's failure to process that grievance was arbitrary, capricious, or even negligent. If it is arguable, no liability should attach for not buying one side of the argument, as opposed to the other. It would destroy needed flexibility if the Union were always obliged to zealously pursue the employee's interpretation. But, in the present case the claim is not that the Union failed to see and/or push the appellants' side of the argument. The appellants' claim is that the Union initiated the argument. When that occurs, the fact that the worker's position is arguable should not be a defense. For then the question is not whether it was arbitrary for the Union to fail to see the argument; the question is, was the Union arbitrary in initiating substantial difficulty for its own members? When the Union has initiated the loss of substantial benefits to its own members, it is incumbent upon the Union to show some justification. There has been no such justification here. Absent justification, this conduct is arbitrary.

Not only is this arbitrary, but it is deceitful. The deceitful nature of the Union's conduct in the present case has cost the plaintiffs-petitioners the right to make an informed choice. The petitioners had consistently seen severance allowance paid to fellow workers in the past. It was reasonable for them to assume that the Railroad, having consistently, voluntarily paid severance for years, would probably pay it to them if the Union would apply pressure. Thus, they could decide not to take the offered jobs in urban areas with a reasonable belief that they still had a pretty good chance of obtaining severance allowance. If the Union had been honest with these men to start with, i.e., told them up front, while they still had a choice, that "No, we aren't going to push your claim, in fact we were responsible for getting the Railroad to quit paying severance," then at least these men could have made an intelligent, informed choice regarding accepting the other jobs. Then if they declined, they at least did so with the realization of what they were up against, and why. Now, according to both the District Court and the Sixth Circuit Court of Appeals, the petitioners are told there is nothing wrong or actionable with this conduct by the Union. Regardless of the contract dispute, the respondent Union has wronged these men. The Union cannot act in a manner which is completely inconsistent with its fiduciary obligation. When the Union has sacrificed substantial interests of its own members for no reason other than the whim of a Union leader, it is no answer to say

that those interests were not clearly vested within the four corners of a written contract.

B. MUST AN EMPLOYEE-UNION MEMBER CARRY HIS OWN GRIEVANCE, WITHOUT UNION ASSISTANCE, TO BINDING ARBITRATION CONTROLLED BY HIS EMPLOYER AND HIS UNION, AFTER HE HAS MADE A CLAIM AGAINST BOTH HIS EMPLOYER AND HIS UNION?

The Supreme Court, in Czosek v. O'Mara, supra, stated and held:

> "And surely it is beyond cavil that a suit against the union for breach of its duty of fair representation is not within the jurisdiction of the National Railroad Adjustment Board or subject to the ordinary rule that administrative remedies should be exhausted before resort to the courts." (p. 24)

The Sixth Circuit in its opinion, relying on Glover v. St. Louis-San Francisco R. Co., 393 U.S. 324, 330, 21 L.Ed.2d 519, 524, 89 S.Ct. 548 (1969), stated that it was incumbent upon the appellants to prove that the arbitration remedy would have been "wholly futile." The Sixth Circuit's Opinion implies that the requirements of complete futility involve more than proving that the Union has breached its duty of fair representation. This is inconsistent with Czosek v. O'Mara, supra. Czosek made the common sense point that if you are

making a claim against your union and your employer, you should not have to submit those claims to a tribunal controlled by the very persons against whom your claim is made. This would seem particularly true in the present case where the petitioners have adduced evidence of not just Union indifference, but active opposition by the Union to the petitioners' claim. Where the Union has indicated active opposition by affirmatively acting to cause the problem in the first place, it defies common understanding to think that the worker has a reasonable prospect of an unbiased tribunal where that tribunal is designed, run and paid for by the Union and the employer.

C. IS THERE A PRE-TRIAL REQUIREMENT OF EXTRAORDINARY PROOF BORNE BY A PLAINTIFF IN A BREACH OF DUTY OF FAIR REPRESENTATION CLAIM?

In Czosek v. O'Mara, supra, the Supreme Court indicated that complaints of a Union's duty of fair representation are to be liberally construed, presumably to the end that the cases would be decided on the merits. Czosek v. O'Mara, supra, 397 U.S. at 27. After indicating in Czosek that complaints involving a Union's duty of fair representation should be viewed favorably, the Supreme Court in Motor Coach Employees v. Lochridge, supra, at 403 U.S. 301, stated that the doctrine of fair representation "carries with it the need to adduce substantial evidence of discrimination

that is intentional, severe and unrelated to legitimate Union objectives. . ." This emphasis on "substantial" evidence raises a question whether this means something beyond proof to a reasonable probability. Does the need to produce "substantial" evidence arise prior to trial? The answer to at least the latter question should be a resounding "no," for in the instant case, the bulk of the evidence which the plaintiffs-petitioners must have, can only be obtained from the Railroad and the Union. The Railroad and the Union have all records which reflect prior interpretation and practice under the applicable contracts. Obviously, where the plaintiffs contend there was an agreement between the Railroad and the Union, personnel of the defendants are the only persons reasonably likely to know of the details of such an agreement. The plaintiff in a fair representation suit, unless his claim is wholly without support, should be allowed to marshal his case for full presentation at trial after completing discovery and investigation. In the present case, the District Court and the Sixth Circuit have either completely ignored Civil Rule 56, or they are applying some higher standard than looking for an issue of fact.

D. WAS THERE AN ISSUE OF MATERIAL FACT?

The highest official involved with the defendant Union admitted finally getting the Railroad to quit paying severance allowance. There has been no

showing whatever of any countervailing benefit to other members of the Union or to the Union as an organization which would in any manner balance the roughly $10,000.00 loss to each of those men who would otherwise have received severance allowance. There was further evidence in the plaintiffs' affidavit, from the tone of Mr. Yost's voice and the nature of what he said, that he was personally hostile towards any union member making a claim for severance allowance. That a high-level union official would be prejudiced against members seeking severance allowance is understandable. By definition, those employees who were seeking severance allowance would thereby be wanting to leave railroading and the Union. Union leaders like Mr. Yost, conditioned by a lifetime of service and loyalty to the organization, could view this as culpable disloyalty, and take it upon themselves to sanction them. Thus, there is an act which is on its face arbitrary, addressed against a group of employees toward whom union prejudice is reasonably likely; and evidence of outright hostility by high union officials toward the petitioners. What is "arbitrary" is a question of fact. St. Clair v. Local U. No. 515, Int. Bro. Teamsters, Etc., 422 F.2d 128, 130 (6 Cir., 1969).

It is true that the respondent Union went through the motions of processing a grievance. It is likewise true that one of the petitioners' fellow workers went through the contract arbitration proceeding and the Union members voted for him. However, neither

of these is necessarily inconsistent with concerted action by the Railroad and the Union against the petitioners. The Supreme Court's earlier opinions have demonstrated to the unions that they cannot blatently violate their members' trust and then rest on a motion to dismiss. The Union should not be able to violate the same trust and get away with it by adopting the more sophisticated tact of making a showing of processing the grievance. In the close and regular working relationship between the Union and the Railroad, it would be easy to make a showing of grievance processing that could nevertheless be foreordained to result in whatever conclusion the Union and Railroad officials privately considered to be their mutual interest. There is evidence in the present case that this is precisely what has happened. The Railway Employees' Department of AFL-CIO claimed personal responsibility for finally getting the Railroad to quit paying severance allowance, the Court must admit to a nagging doubt whether the Union's show of processing the petitioners' grievance was anything more than a sham. The petitioners ask only for the opportunity to develop fully that nagging doubt and present their case at trial. To fail to allow this is to erase what this Court established in Czosek v. O'Mara, supra. It matters little if motions to dismiss are to be liberally viewed, if the trial court may then impose on the plaintiffs an extraordinary standard of proof when a motion for summary judgment appears.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Supreme Court should exercise its discretion and hear this case in order to clarify the duty of fair representation. It is an issue of national importance that the lower federal courts not unduly restrict this fiduciary obligation by restrictive application. The consequences to millions of union members are severe. There is nothing so fundamentally frustrating and unfair as to force an individual to submit his claim to a tribunal that he knows will not give him a fair hearing. That is the result reached below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Charles A. Williams, counsel for J.H. Cheatham, et al, in the matter styled "J.H. Cheatham, et al, v. Illinois Central Gulf Railroad Co., et al", do hereby certify that I served a true copy of the foregoing petition (with Appendix) for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit on the respondent on July 11th, 1975, by depositing same in a United States mailbox with first class air mail postage prepaid, addressed to Mulholland, Hickey & Lyman, 1125 Fifteenth Street, N.W., Washington, D.C. 20005 and Segal, Isenberg, Sales & Stewart, the Tenth Floor, Republic Building, Louisville, Kentucky 40202, attorneys for respondent Brotherhood of Railway Carmen of the United States and Canada, Operating Through System No. 99, Railway Employes' Department AFL-CIO, and to the Hon. Martin W. Fingerhut, 135 East Eleventh Place, Chicago, Illinois 60605 and the Hon. James G. Wheeler, Wheeler, Myre & Myre, Citizens Bank Building Paducah, Kentucky 42001, attorneys for respondent Illinois Central Gulf Railroad Company.

Chas. A. Williams

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

J. H. CHEATHAM, L. T. JETTON, et al,
Plaintiffs

v.

ILLINOIS CENTRAL GULF RAILROAD COMPANY and BROTHERHOOD OF RAILWAY CARMEN OF THE UNITED STATES AND CANADA, Operating Through System No. 99, RAILWAY EMPLOYES' DEPARTMENT AFL-CIO,
Defendants

Civil Action No. 2359-P

MEMORANDUM OPINION AND ORDER
GRANTING SUMMARY JUDGMENT

In this action plaintiffs, former car department employees of the Illinois Central Railroad[1] (hereinafter referred to as the Railroad) seek damages from their employer and their collective bargaining representative, the defendant Brotherhood Railway Carmen of the United States and Canada (Brotherhood) because, as plaintiffs allege, the defendants unlawfully conspired to deprive plaintiffs of separation allowances which plaintiffs contend they should have received under the provisions of a collective bargaining agreement entered into by the defendants on September 25, 1964. The aforesaid agreement of 1964 was entered into be-

[1]Subsequent to the occurrence of events giving rise to the dispute involved, the Illinois Central Railroad merged with the Gulf Mobile and Ohio and the merged company operates as Illinois Central Railroad Gulf Company.

tween most of the railroads of the United States and their employees represented by the so-called "shop crafts" unions.

The 1964 agreement provided that employees of the Railroad, such as plaintiffs, would be granted monetary benefits in the event of their "displacement" or "dismissal" from their employment in jobs with the Railroad as carmen, carmen helpers, or carmen apprentices occasioned by a relocation of such work from one point to another on the Railroad. The 1964 agreement defines a "displaced" employee as an employee who upon abolishment of his job is able, through the exercise of his seniority rights, to obtain a different job in his same craft and class with the Railroad in which the monthly compensation, however, is less than his average monthly compensation during a test period of some 12 months prior to his displacement. The agreement defines a "dismissed" employee as an employee who, because of the lack of seniority in consideration of the jobs available, is unable to hold any job within his craft and class with the Railroad.

In the case of a "displaced" employee, the agreement provides that the employee will be paid a monthly "displacement allowance" calculated in an amount which when combined with the employee's earnings in his new job will equal the level of his monthly average compensation during the described test period. In the case of a "dismissed employee", the agreement provides for the payment of a "dismissal allowance" calculated in an amount which when combined with any monthly earnings of such an employee from other employment will equal his average test period monthly compensation. The 1964 agreement further provides that a dismissed employee has the option to elect to resign from employment with the Railroad and accept a lump sum "separation allowance" in lieu of monthly payments of a dismissal allowance. Such a separation allowance is calculated in an amount measured by the dismissed employee's average test period earnings and the length of his prior employment with the Railroad.

Section 3 of the 1964 agreement provides that an employee shall not be deemed to be displaced or dismissed if he fails to accept a position available to him in the exercise of his seniority elsewhere on the system of the Railroad.

On or about April 28, 1969, the Railroad posted a bulletin that certain car department jobs at Fulton, Kentucky, the work location of plaintiffs, would be abolished effective ninety (90) days from that date and that the carmen and other car department employees whose jobs were abolished could exercise their seniority rights to follow their work and obtain other similar jobs available to them at other designated points of employment on the Railroad.

Subsequent to the publication of the job abolishment notice in April, 1969, representatives of the defendants conferred, as they were required to do under the provisions of the 1964 agreement, to negotiate an "implementing" agreement relating to the rights of employees whose jobs were abolished. Such an agreement is used to implement the terms of the basic agreement and contains provisions relating to payment by the railroad of the expenses incurred by employees in transferring to their new work locations, and so on. Thus, the implementing agreement in this instance, negotiated on July 21, 1969, provided that the employees involved would be compensated for a certain number of days of leave used in locating new homes at their new points of employment, for the payment of moving expenses including the transportation of household goods, indemnification of losses, if any, such employees incurred from the sale of their old homes, or those arising out of the cancellation of leases for rental of same, all as provided for in the basic 1964 agreement.

In addition, the implementing agreement provided that the Railroad promptly would notify the affected employees of positions available to them elsewhere on the Railroad. On July 22, 1969, the day after the implementing agreement was signed, notices were posted at Fulton listing available vacancies in the

carmen craft throughout the system, as well as a list of "set up" carmen who could be displaced through the exercise of seniority by employees at Fulton. The named plaintiffs in this action are in the categories of painters, carmen, carmen apprentices, and carmen helpers. The abolished positions included one painter, 28 carmen, three carmen apprentices, and ten carmen helpers. The job-vacancy bulletins posted on July 22 listed two painter positions, over 200 carmen positions, three carmen-apprentice positions, and ten carmen-helper positions.

As stated above, the basic 1964 agreement did not contain any provision by which displaced employees, as contrasted with dismissed employees, would have the option to elect to accept a lump sum settlement in lieu of the allowances provided for. However, the July, 1969 implementing agreement negotiated by defendants did contain a provision that a car department employee at Fulton whose job was abolished and who was sixty (60) years of age or older on April 28, 1969, the date of publication of the job abolishment notice, could elect not to follow his work and obtain a job at a new point of employment (with the guaranteed payment of his average test period earnings), but could, in lieu thereof, elect to resign and accept a separation allowance equal to two hundred sixty (260) days of compensation (which amount was less than a dismissed employee would be entitled to receive under the 1964 agreement).

The record discloses that plaintiffs who were under sixty (60) years of age, and thus not qualified under the provisions of the implementing agreement to elect to accept a lump-sum separation allowance, promptly evidenced their desire also to be given such option to accept a lump-sum separation allowance rather than move to car department jobs available to them at other points on the Railroad.

On two separate occasions representatives of the Railroad met with the car department employees at Fulton to discuss the effect of the bulletin. Each time the employees asked

whether they (employees under sixty years of age) would be entitled to receive separation allowances, and each time, they were advised that the Railroad would not be agreeable to pay separation allowances, and that it was not obliged so to pay an do under the 1964 agreement because the Railroad had jobs elsewhere for all the employees involved.

The record further discloses that, acting at the behest of plaintiffs, General Chairman Zack, the representative of the defendant Brotherhood elected by plaintiffs and other Railroad car department employees responsible for negotiation of the implementing agreement with the Railroad, presented the request of plaintiffs to the appropriate officers of the defendant Railroad and conferred at length, sometimes accompanied by representatives of the plaintiffs, in an attempt to persuade the Railroad to lower below sixty (60) years of age the qualification at which age plaintiffs could elect not to follow their work and receive displacement allowances, but in lieu thereof, could resign and receive a lump sum separation allowance.

The proposal of the Brotherhood representative was unacceptable to the Railroad because there were jobs available to plaintiffs in which their services were required by the Railroad.

Plaintiffs were informed of the failure of the Brotherhood representative to negotiate a change in the implementing agreement such as sought by plaintiffs. Plaintiffs thereafter continued to express their dissatisfaction with the decision of the Railroad, and, as requested by plaintiffs and in further representation of their interests, the Brotherhood representative on September 29, 1969, filed a formal claim with the Railroad contending as plaintiffs insisted, that a proper interpretation of the basic 1964 agreement required the Railroad to grant plaintiffs the option to accept lump-sum separation allowances in lieu of retention of jobs with the Railroad.

After repeated conferences between representatives of the defendants, plaintiffs' claims were finally denied by the Rail-

road on December 20, 1969. The complaint does not allege that any of the plaintiffs progressed this claim to arbitration nor does it allege any reason or excuse for the failure to do so.

The Railway Labor Act, 45 U.S.C. 151 et seq. contains provisions which have been consistently referred to in prior relevant judicial articulation as requiring compulsory arbitration for the resolution of disputes between a railroad, such as the defendant Railroad, and its employees, arising out of the interpretation and application of provisions of collective bargaining agreements. The cases hold that courts do not have jurisdiction over such disputes.

That Act provides that such disputes, commonly referred to as "minor" disputes (to distinguish them from so-called "major" disputes between a Railroad and its employees in connection with the negotiation or modification of a basic agreement such as the 1964 agreement governing rules, wages, and working conditions of employees), shall be processed to final decision "on the property" of a Railroad, and if not then resolved, resort to arbitration may be sought by the Railroad or the employees involved by an arbitration board constituting one of the divisions of the National Railroad Adjustment Board, or one of a number of other similar boards of arbitration also authorized to be established by the Act, 45 U.S.C.A. 153, First, and Second.

Upon receipt of the Railroad's denial of plaintiffs' claim the Brotherhood representative conferred with higher officials of the Brotherhood and with representatives of the Railway Employes' Department, AFL-CIO, which is a labor organization with which the defendant Brotherhood and the other five so-called "shop craft" railway labor organizations are affiliated, to determine whether plaintiffs' claims were of sufficient merit such as to warrant submission to and decision by a board of arbitration. It was the decision of representatives of the Department and officers of the Brotherhood that plaintiffs' claims were not of sufficient merit to be processed further and through arbitration. Each of plaintiffs was informed of such decision, and each plaintiff was advised of his right under

the Railway Labor Act to individually process an appeal of his claim through arbitration.

Subsequent thereto one J. D. Tucker, one of the employees involved although not included as a plaintiff here, advised the Brotherhood of his desire to process such an appeal, and with the assistance of the Department his claim was presented for arbitration by Special Board of Adjustment No. 570, an arbitration board established under the basic 1964 agreement to finally resolve disputes arising out of the interpretation and application of the provisions of the 1964 agreement. Tucker's claim was presented to the Special Board which was composed of two representatives of the Railroad, two representatives of the Department, and a neutral (or referee) jointly selected by the other members of the Board, namely, Mr. William H. McPherson.

Tucker's claim was denied by a majority of the Board on May 10, 1971, with the labor members dissenting from the decision. The ruling of the Special Board was that contrary to the contention of Tucker, the Railroad was not required under the basic 1964 agreement to grant him the option to elect to resign and receive a lump-sum separation allowance in lieu thereof, because of the availability to him of other jobs with the Railroad.

None of the plaintiffs undertook a similar course of action to obtain a final determination of their claims against the Railroad, although they have persisted in their contention that they have been unlawfully deprived of benefits, i. e., separation allowances, under the basic 1964 agreement to which they are entitled.

Both defendants filed with this Court motions in the alternative for dismissal of the complaint, or for a grant of summary judgment. Said motions were supported by a number of affidavits, which were in turn supported by documentary evidence descriptive of the nature of the dispute and its handling by defendants. We thus treat the matter as if on summary judgment. Defendants contend that their motions should be granted because of: (1) failure of plaintiffs to resort to and exhaust

their contractual administrative remedies before Special Board of Adjustment No. 570 as described above or, in the alternative, before the statutory compulsory arbitration tribunals provided for in Section 3 of the Railway Labor Act, 45 U.S.C. 153; (2) failure of plaintiffs to resort to and exhaust their internal union administrative remedies such as provided for and required by the Constitution of the defendant Brotherhood; and (3) otherwise and as a matter of law, because the undisputed facts relevant and material to the dispute show that plaintiffs have failed to state a claim entitling them to relief.

As noted above, and as annotated in the memoranda submitted in support of defendants' motions, the Railway Labor Act provides what the Supreme Court of the United States has described as a system of compulsory arbitration for the resolution of disputes such as the instant one between plaintiffs and the defendant Railroad. Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co. 353 U.S. 30, 1 L.ed 2d 622 (1957); Gunther v. San Diego, Arizona Eastern Ry., 382 U.S. 257, 15 L. ed 2d 308 (1965). The principles of these rulings have been reiterated by the several Courts of Appeal in leading cases such as Diamond v. Terminal Ala. State Docks, 421 F.2d 228 (5th Cir. 1970); BRT v. Denver, R.G.W.R.Co., 370 F.2d 833 (9th Cir. 1966), cert. denied, 386 U.S. 1018; Order of Railroad Conductors & Brakemen v. Spokane P. & S.R. Co., 366 F.3d 99, (9th Cir. 1966), cert. denied, 385 U.S. 1025.

The substance of these decisions is that claims such as plaintiffs' must be processed through the contractual procedures established by terms of the agreement or established by the Railway Labor Act, 45 U.S.C. 153, including finally, resort to and decision by a board of arbitration prior to resort to the Federal courts. Further, as specifically set forth in Section 3 of the Act, the awards of such boards are final and binding on the parties to the dispute, and are not reviewable on their merits in the Federal District Courts. Thus, this Court does not have jurisdiction of the subject matter of this action.

Nor is there jurisdiction in the Federal District Courts to entertain an action for damages, such as here filed by plaintiffs, for an alleged breach of the provisions of such an agree-

ment, or for collateral attack upon the validity for any decision made in resolution of such a dispute by a properly authorized arbitration board. Union Pac. R.Co. v. Price, 360 U.S. U.S. 601, 3 L.ed 2d 1460 (1959); Edwards v. St Louis-San Francisco R. Co., 361 F.2d 964 (7th Cir. 1966); Diamond, supra. The Court finds that the decision of Special Board of Adjustment No. 570, denying the claim filed by Tucker, which was representative of the contentions made here by plaintiffs as to the measure of their rightful benefits under the 1964 agreement, constituted a final and binding determination of the merits of plaintiffs' claim that they were entitled to receive separation allowances from the Railroad, and is dispositive of any question of whether or not the 1964 agreement was violated by the defendants. It follows that inasmuch as plaintiffs have not been deprived of any benefit to which they were entitled under that agreement, there is no reasonable support for plaintiffs' contention that the defendants engaged in an unlawful conspiracy to deprive them of any "right" they possessed under the 1964 agreement.

The Court further finds that as contended by the defendant Brotherhood none of the plaintiffs sought to avail themselves of the remedies provided them by the Constitution of the Defendant Brotherhood to resolve any claim they had relating to the action, or inaction, of the representatives of the Brotherhood in the handling of their claims against the defendant Railroad. The record shows that the Brotherhood's Constitution provides a complete and orderly procedure for the resolution and disposition of any charge made by a member of the Brotherhood who believes he has been aggrieved by any action or omission on the part of any of the Brotherhood's officers or other members. The Brotherhoods' Constitution in addition to providing for consideration of such a claim at various echelons within the Brotherhood higher than the position of the General Chairman, whose actions are complained of by plaintiffs, also contains a provision requiring each of plaintiffs as a member of the Brotherhood to resort to and exhaust internal union remedies before initiating judicial action against the Brotherhood. Plaintiffs' complaint

fails to allege any reason for their failure.

The record shows that none of plaintiffs have complied with these provisions of their Constitution which are binding upon them as members of the Brotherhood. IAM v. Gonzales, 356 U.S. 617-618, 2 L.ed 2nd 1018, 1020 (1958).

The requirement that railway employees such as plaintiffs resort to and exhaust available union remedies, or at least attempt to do so, when they believe they have been aggrieved by union action, was established in our Federal Labor policy coincident with the enunciation of the doctrine that the Railway Labor Act, properly interpreted, imposes a duty upon a collective bargaining representative to fairly represent all members of the class involved. Steele v. Louisville & Nashville R. Co., 323 U.S. 192, 207, 89 L.ed 173, 186; Tunstall v. Bro. of Loco. F&E, 323 U.S. 212, 89 L.ed 192, 193 (1944).

In relying on such doctrine in Brady v. Trans World Airlines, Inc., 401 F. 2d 87, 104 (3rd Cir. 1968), Judge Forman remarked:

> There is good reason for this rule which forstalls judicial interference with the internal affairs of a labor organization until it has had at least some opportunity to resolve disputes concerning its own legitimate affairs.
>
> * * * * * *

The Federal Courts have held uniformly that they do not have the right to interfere with the internal management of a union or to entertain an action seeking redress of an alleged wrong by a union representative against a member of the Union in the absence of a showing that the alleged aggrieved member has first exhausted available union remedies, or at lease sought to do so, or to show that such effort would be futile. Turnstall, supra; Neal v. System Board of Adjustment, 348 F.2d 722 (8th Cir. 1965); Fingar v. Seaboard Airline Railroad Co., 277 F.2d 698, 700-701 (5th Cir. 1960).

The record also clearly shows, as defendants contend, that plaintiffs have failed to state a claim for which relief can be granted. While plaintiffs' pleadings indicate some confusion with respect to the type of benefits granted employees "displaced" from their jobs, as contrasted with employees "dis-

missed" from their jobs, the terms of the basic 1964 agreement seem to us to be clear; i.e., that the relative employment status of "displaced" and "dismissed" employees differ substantially, in that displaced employees are those that remain in the employment of the Railroad involved by successfully bidding for and obtaining jobs differing only as to location from jobs they formerly held which were abolished by the Railroad. Whereas, on the other hand, dismissed employees are by the terms of the 1964 agreement those employees who, because of their relative lack of seniority in consideration of the number of jobs available, are unable to retain a job with the Railroad within the craft and class of work they are qualified to perform. With such marked difference in employment status being evident, the benefits provided for "displaced" employees understandably differ from those provided for "dismissed" employees.

Significantly, the terms of the 1964 agreement impose a major requirement upon employees affected in their employment by reason of one of the changes in operation made by the defendant Railroad such as relocation and consolidation of facilities and work. This requirement is that the employees affected must exercise the seniority each possesses in order to attempt to retain a job, the duties of which he is qualified to perform with his Railroad employer. As stated by the Special Board in the Tucker award, it was his failure to accept a job available to him which resulted in his loss of all benefits under the 1964 agreement.

We refer to these provisions of the 1964 agreement, a copy of which is part of the record in this case, not for the purpose of interpretation and adjudication of the merits of plaintiffs' claims, but so as to explain what appears to the Court to be the crux of plaintiffs' complaint, and to show that they have failed to state a valid claim entitled to relief against the defendants.

In evaluating the substance of plaintiffs' contention of an unlawful conspiracy between defendants, the Court has considered carefully the evidence presented through affidavits submitted by the parties, including the documentary data submitted in support of factual assertions in such affidavits. In all material respects, the facts relied upon separately by the parties have not been sought to be countered by the other.

We note plaintiffs' reliance upon assertions that defendant Railroad in its past administration and application of the provisions of the 1964 agreement had agreed to and did pay separation allowances to displaced employees at other locations. Defendants do not deny or attempt in any way to refute this contention of plaintiffs. The fundamental error in plaintiffs' argument is their insistence that the 1964 agreement must be interpreted as requiring the defendant Railroad to pay separation allowances to plaintiffs simply because the defendant Railroad in previous transactions of similar nature found it expedient to do so for employees similarly affected as plaintiffs, and the Brotherhood and the employees involved were agreeable to the additional benefits granted. The 1964 agreement does not so require.

Plaintiffs also contend that remarks made by the President of the Department in telephonic conferences relating to the dispute with certain of the plaintiffs show that he was opposed to the payment by the Railroad of separation allowances, and that such attitude could have been reflected in the handling of the Tucker claim before the Special Board, and the position of the Department on the merits of plaintiffs' claim.

The Court has carefully reviewed the contents of the affidavits submitted, and all relevant evidence of record, and finds that there is no materiality or relevance in this contention to the basic issue required to be presented by plaintiffs to give us jurisdiction, i.e., concerning the nature of the benefits plaintiffs were entitled to receive under the 1964 agreement. As plaintiffs concede, it is from the 1964 agreement that

their rights, if any, flow, and it is their failure to invoke and exhaust the grievance machinery of that agreement, or the provisions of the Railway Labor Act dealing with the handling of such grievances, that is the basis of this Court's action.

For the foregoing reasons, it is the conclusion of this Court that summary judgment should be granted the defendants for failure of the plaintiffs to resort to and exhaust available contractual statutory and internal union remedies or to allege valid reasons for such failure prior to resort to this Court, and for the failure of plaintiffs to state a claim upon which relief could be granted.

SO ORDERED.

February 11, 1974

JAMES F. GORDON
United States District Judge

Copies to:

Counsel of record.

APPENDIX "B"

No. 74-1492

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

J. H. CHEATHAM, et al. Plaintiffs-Appellants, v. ILLINOIS CENTRAL GULF RAILROAD COMPANY and BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, Operating Through System Federation No. 99, RAILWAY EMPLOYES' DEPARTMENT AFL-CIO, Defendants-Appellees.	APPEAL from the United States District Court for the Western District of Kentucky, Paducah Division.

Decided and Filed February 5, 1975

Before: McCree, Lively and Engel, Circuit Judges.

Per Curiam. The plaintiffs appeal from summary judgment entered in favor of both defendants by the district court. In their complaint the plaintiffs sought damages for breach of a contract between the Railroad as employer and the Union as representative of employees of the Railroad including plaintiffs. The contract in question is referred to as the 1964 Agreement, and a copy was filed as an exhibit to the complaint.

In the complaint it is alleged that the 1964 Agreement provides "that any employee who is deprived of employment

as a result of a change in operations of the carrier may, at his option at the time he becomes eligible, resign and accept in a lump sum a separation allowance." The jobs of the plaintiffs at Fulton, Kentucky were abolished and they were offered similar employment at other locations, with allowances for relocation expenses, but were not offered the option of accepting lumb sum separation allowances in lieu of transfer. It is further alleged that the "Union conspired and cooperated with the . . . Railroad . . . overtly or covertly to permit the . . . Railroad . . . to refuse to pay to plaintiffs the separation allowance due them under" the 1964 Agreement.

Upon motions for summary judgment it became clear that both defendants disputed the claim that the 1964 Agreement gives to plaintiffs the right to receive separation allowances. Thus, the first issue presented by the complaint could only have been resolved by an interpretation of the 1964 Agreement. However, the 1964 Agreement requires that disputes arising out of grievances concerning the interpretation or application of provisions for employee protection be settled by binding arbitration. Furthermore, Section 3 of the Railway Labor Act, 45 U.S.C. 153, provides for primary jurisdiction in the National Railroad Adjustment Board over disputes involving "minor" grievances between railroads and their employees. The present dispute is "minor" within the meaning of the Act and cases. It has been clearly held that the pertinent provisions of the Act are to be treated as creating a compulsory arbitration requirement. Andrews v. Louisville & Nashville R.R., 406 U.S. 320 (1972); Gunther v. San Diego & Arizona Eastern Ry. Co., 382 U.S. 257 (1965); Order of Ry. Conductors v. Pitney, 326 U.S. 561 (1946).

The plaintiffs assert that it would have been futile for them to have invoked the arbitration provisions of the 1964 Agreement or the Act since the defendants have conspired together to deny them benefits and would be able, by continuing to act together, to foreclose a fair result by arbitration. Resort to

the courts without first utilizing the machinery of binding arbitration is permitted if it would be "wholly futile" to require exhaustion of contractual or administrative remedies. Glover v. St. Louis-San Francisco Ry. Co., 393 U.S. 324, 330 (1969). This record does not reveal such a case. It is noted that a fellow employee did seek the same relief by arbitration which plaintiffs are seeking in this action. The Union processed that employee's grievance and the union members of the special arbitration board voted in favor of the employee's claim. Even if the Union had refused to process or assist in the plaintiffs' grievances, their failure to exhaust the remedies of adjustment would not be excused since individual employees have the right and standing to prosecute their own grievances. O'Mara v. Erie Lackawanna R.R., 407 F.2d 674 (2d Cir. 1969), aff'd sub. nom. Czosek v. O'Mara, 397 U.S. 25 (1970).

Upon consideration of the entire record, including briefs and oral arguments, we conclude that the District Judge Properly determined that the case as developed on motions for summary judgment contained "no genuine issue as to any material fact and that the moving part [ies were] entitled to a judgment as a matter of law." Rule 56 (c), Fed. R. Civ. P. It is clear that the real issue between the parties concerns the proper interpretation of the 1964 Agreement, and this issue must be decided by arbitration. Balowski v. International Union, United A., A. & A. Imp. Workers, 372 F.2d 829 (6th Cir. 1967).

The judgment of the district court is affirmed.

APPENDIX "C"

No. 74-1492

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

J. H. CHEATHAM, et al. Plaintiffs-Appellants v. ILLINOIS CENTRAL GULF RAILROAD COMPANY and BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, Operating Through System Federation No. 99, RAILWAY EMPLOYES' DEPARTMENT AFL-CIO. Defendants-Appellees	ORDER

BEFORE: McCREE, LIVELY and ENGEL, Circuit Judges.

No judge in regular active service of the court having requested a rehearing en banc, the petition for rehearing has been referred to the panel which heard the case.

In their petition for rehearing the appellants have requested that the court reconsider its opinion in the light of Czosek v. O'Mara, 397 U.S. 25 (1970). In that case the Court of Appeals had reversed a district court dismissal of an employee's complaint against the employer railroad and a union. The Supreme Court affirmed, holding that "the complaint against the union [was] sufficient to survive a motion to dismiss." Id. at 27. In the present case the appeal was from summary judgment, not from an order of dismissal. Thus, this court was required to examine the entire record upon which the district court based its decision. It was not a case where we merely exa-

mined the complaint to determine whether it could, under any set of facts, state a good cause of action. Conley v. Gibson, 355 U.S. 41 (1957). The allegations of the complaint were sufficient to survive a motion to dismiss, but the facts developed on the motion for summary judgment demonstrated that the allegations of union wrongdoing and collusion were unsupported claims which did not remove this dispute from the arbitration provisions of the collective bargaining agreement.

It should be noted that this case involved an appeal from judgment in favor of the railroad employer as well as the union. The quotation from our opinion contained on page 4 of the petition for rehearing refers to the action against the railroad, not the union, and is a correct statement of the law. See O'Mara v. Erie Lackawanna R.R., 407 F.2d 674, 677 (2d Cir. 1969), aff'd, 397 U.S. 25 (1970).

When challenged by a properly supported motion for summary judgment a union member must produce sufficient proof to raise a genuine issue of material fact beyond conclusory allegations of failure of representation to avoid a contractual requirement that disputes arising under a collective bargaining agreement be adjusted by arbitration.

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

Clerk